

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3  
4 BRENTON DUANE AVERY, ) No. C 05-0700 CW (PR)  
5 Petitioner, )  
6 v. ) ORDER OF DISMISSAL AND GRANTING  
7 SCOTT KERNAN, Facility ) LEAVE TO PROCEED IN FORMA  
8 Warden, ) PAUPERIS  
9 Respondent. ) (Docket nos. 2, 4)  
10

#### INTRODUCTION

11 Petitioner Brenton Duane Avery, a prisoner of the State of  
12 California incarcerated at the California State Prison-Sacramento,  
13 has filed a pro se petition for a writ of habeas corpus pursuant  
14 to 28 U.S.C. § 2254 and an application for in forma pauperis  
15 status. Venue is proper in this judicial district because  
16 Petitioner was convicted and sentenced in Sonoma County Superior  
17 Court. See 28 U.S.C. § 2241(d).

#### BACKGROUND

18 According to the allegations in the petition a jury found  
19 Petitioner guilty of robbery, attempted robbery, assault with  
20 intent to commit serious bodily injury, and two sentence  
21 enhancements. On October 16, 2002, the trial court sentenced  
22 Petitioner to sixty years to life in State prison. The California  
23 Court of Appeal affirmed the judgment of conviction in 2003.  
24 Petitioner did not seek review from the State supreme court or  
25 seek other State post-conviction relief. He filed his federal  
26 habeas corpus petition on February 16, 2005.

#### EXHAUSTION

28 Prisoners in State custody who wish to challenge in federal  
habeas proceedings either the fact or length of their confinement

1 are first required to exhaust State judicial remedies by  
2 presenting the highest State court available with a fair  
3 opportunity to rule on the merits of each and every claim they  
4 seek to raise in federal court. See 28 U.S.C. § 2254(b), (c));  
5 Rose v. Lundy, 455 U.S. 509, 515-16 (1982). If available State  
6 remedies have not been exhausted as to all claims, the district  
7 court must dismiss the petition. Id. at 510; Guizar v. Estelle,  
8 843 F.2d 371, 372 (9th Cir. 1988). A dismissal solely for failure  
9 to exhaust is not a bar to returning to federal court after  
10 exhausting available State remedies. See Trimble v. City of Santa  
11 Rosa, 49 F.3d 583, 586 (9th Cir. 1995).

12 In order to exhaust, the State's highest court must be given  
13 an opportunity to rule on the claims even if review is  
14 discretionary. See O'Sullivan v. Boerckel, 526 U.S. 838, 845  
15 (1999) (petitioner must invoke "one complete round of the State's  
16 established appellate review process."). However, if it is clear  
17 that the State court would reject a petitioner's attempt to  
18 exhaust State remedies by holding the claim procedurally barred  
19 under State law then the exhaustion requirement is satisfied. See  
20 Castille v. Peoples, 489 U.S. 346, 351 (1989). In that event the  
21 claim is procedurally barred from review in the federal habeas  
22 case as well. See Coleman v. Thompson, 501 U.S. 722, 735 n.1, 750  
23 (1991). But if the State gives a petitioner with a potentially  
24 procedurally defaulted claim a second chance to raise the claim in  
25 the State's high court and he takes advantage of that chance, he  
26 properly exhausts his claim and avoids procedural default. See  
27 Park v. California, 202 F.3d 1146, 1153-54 (9th Cir. 2000)  
28 (petitioner who failed to seek direct review from Supreme Court of  
California properly exhausted his claim and avoided procedural  
default because Supreme Court of California provided him with

1 second chance to present his claim via State habeas).

2 Because Petitioner's federal habeas petition indicates that  
3 he did not present his claims to the State supreme court for  
4 review, either in a petition for review or in a State petition for  
5 a writ of habeas corpus, his federal petition is unexhausted and  
6 must be DISMISSED. This dismissal is without prejudice to  
7 Petitioner returning to State court to exhaust his State remedies  
8 and then filing a new federal habeas corpus petition. Should he  
9 do so, he is advised to file his new federal habeas corpus  
10 petition as soon as possible after his State court proceedings  
11 have concluded. The Court makes no ruling at this time on the  
12 issue of the timeliness of any future federal petition.

13 Leave to proceed in forma pauperis is GRANTED. (Docket nos.  
14 2, 4).

15 The Clerk of the Court shall enter judgment and close the  
16 file.

17 IT IS SO ORDERED.

18 DATED: 11/9/05

19 

20 CLAUDIA WILKEN  
21 United States District Judge  
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